UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALLYSON HENRY, Plaintiff, v. IAC/INTERACTIVE GROUP and EXPEDIA, INC., Defendants.	CASE NO. C05-1510RSM ORDER GRANTING MOTION TO DISQUALIFY

INTRODUCTION

This matter comes before the Court on defendants' motion to disqualify plaintiff's counsel, Schwerin Campbell Barnard, LLP, along with affiliated attorney Curt Chapman, from representing plaintiff in this action.[1] (#13). Defendants argue that such disqualification is required to preserve the attorney-client privilege and the integrity of the judicial process as a result of counsel's wrongful acquisition and retention of tens of thousands of Expedia

[1] The Court notes that defendants apparently request that plaintiff's co-counsel, Suzanne Thomas, also be disqualified. However, that request has been improperly raised for the first time in defendants' reply brief. Furthermore, none of the arguments presented in defendants' motion to disqualify pertain to any action taken by Ms. Thomas, or alert plaintiff's counsel that the request for disqualification at all pertains to Ms. Thomas. Thus, plaintiff has been deprived of presenting any response to the suggestion that Ms. Thomas should also be disqualified. Accordingly, the Court reviews defendants' motion only as it pertains to Schwerin Campbell Barnard and Mr. Chapman.

documents and other property.

Plaintiff responds that disqualification is neither necessary nor appropriate in this case because her counsel was sensitive to privilege issues, and disclosed to opposing counsel that counsel had received defendants' property from plaintiff, but defendants did not request its return in a timely fashion.

For the reasons set forth below, the Court disagrees with plaintiff, and GRANTS defendants' motion to disqualify.

DISCUSSION

A. Background

A complete background can be found in this Court's recent Order on defendants' motion for a preliminary injunction. Accordingly, the Court will not repeat it here.

C. Standard of Review for Disqualification

Federal courts have the authority to discipline attorneys appearing before them for conduct deemed inconsistent with ethical standards. *In re Snyder*, 472 U.S. 634, 645 n. 6 (1985); *Erickson v. Newmar Corp.*, 87 F.3d 298, 303 (9th Cir. 1996) (explaining that "a district court has the primary responsibility for controlling the conduct of the attorneys who practice before it."). That discipline includes disqualification of counsel if the conduct complained of demands such a measure. In general, disqualification is viewed as a drastic remedy, and therefore, should be imposed only when absolutely necessary. *In re Firestorm*, 129 Wn.2d 130, 140 (1996). However, where the "asserted course of conduct threatens to affect the integrity of the adversarial process" disqualification may be the most appropriate measure to eliminate such taint. *See MMR/Wallace Power & Indus. Inc. v. Thames Assoc.*, 764 F. Supp. 712, 718 (D. Conn. 1991) (citations omitted). In considering a potential disqualification, this Court "must be mindful that 'the interests of the clients are primary, and the interests of the lawyers are secondary.'" *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp.2d 1055, 1066 (W.D. Wash. 1999) (citing *Haagen-Dazs Co., Inc. v. Perche No! Gelato, Inc.*, 639 F. Supp. 282, 286 (N.D.

Cal. 1986)).

In support of their motion to disqualify, defendants primarily rely on this Court's decision in *Richards v. Jain*, 168 F. Supp.2d 1195 (W.D. Wa. 2001). In that case, the Honorable Thomas S. Zilly, now-Senior United States District Court Judge, held that an attorney "who receives privileged documents has an ethical duty upon notice of the privileged nature of the documents to cease review of the documents, notify the privilege holder, and return the documents," and that a failure to follow that rule is grounds for disqualification. *Richards*, 168 F. Supp.2d at 1200-01. Plaintiff argues that the Court should not follow the reasoning of that case until it has determined "the effect on the *Richards* analysis of Washington law." (Dkt. #43 at 21). It is not clear to the Court what plaintiff means by that statement. However, the Court notes that the *Richards* decision involved an analysis not only of a formal opinion by the American Bar Association's ("ABA") Committee on Ethics and Professional Responsibility, but an analysis of Washington State law on motions for disqualification, as well. Indeed, in adopting six factors for consideration from a Texas case, *In re Meador*, 968 S.W.2d 346 (1998), the *Richards* Court noted that those factors "neatly incorporate the concepts of prejudice, bad faith, and knowledge elucidated by the Washington Supreme Court as elements to be weighed in evaluating a motion to disqualify." *Richards*, 168 F. Supp.2d at 1205 (citations omitted). Accordingly, the Court is not persuaded that it should not apply the *Richards* analysis to the instant motion, and will follow the analysis in more detail below.

B. *Meador* Analysis

There are six factors the *Richards* Court set forth to aid in evaluating whether disqualification is called for when an attorney receives privileged information outside the normal course of discovery:

> 1) whether the attorney knew or should have known that the material was privileged;
>
> 2) the promptness with which the attorney notifies the opposing side that he or she has received privileged information;

> 3) the extent to which the attorney reviews and digests the privileged information;
>
> 4) the significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;
>
> 5) the extent to which movant may be at fault for the unauthorized disclosure; [and]
>
> 6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.

Richards, 168 F. Supp.2d at 1205 (quoting *In re Meador*, 968 S.W.2d at 351-52). The Court will discuss those factors as applied to the instant case in turn.

1. Knowledge of the Privileged Material

Plaintiff hired her counsel in July 2004, approximately three months prior to the termination of her employment. During the summer, she provided information pertaining to her discrimination complaint to counsel, including some Expedia e-mail and documents. Plaintiff maintains that she took precautions not to disclose any information she possessed that was privileged as to her former employees at that time. Plaintiff's counsel was aware that plaintiff possessed an Expedia laptop computer, upon which tens of thousands of e-mails and other documents were located, as well as her personal computer which also possessed Expedia documents. However, it was not until at least May 2005, some nine months later, that plaintiff's counsel informed defendants that plaintiff continued to possess her Expedia-issued computer which contained Expedia documents and e-mail.

On June 23, 2005, plaintiff delivered three computers to her counsel, at her counsel's request. At that time, plaintiff's counsel asked a representative from the firm's IT department to archive and copy all "PST" files from the computers and obtain an image of each computer. Counsel then attempted to build an electronic sorting mechanism that would sort plaintiff's e-mail into certain categories. Nothing in the record indicates whether plaintiff was asked whether her computers contained any privileged information, although presumably plaintiff's counsel

knew that was a high probability because plaintiff had previously screened out privileged documents and did not produce them to her counsel.

On July 6, 2005, counsel apparently informed defendants' counsel that she was in possession of a large volume of Expedia e-mail. On July 11, 2005, plaintiff reiterated that she had a large volume of IAC and Expedia e-mail in her possession through her answers to defendants' Interrogatories. Nothing in the record indicates that plaintiff's counsel informed defendants that she was in possession of defendants' potentially-privileged documents.

On July 7-14, 2005, plaintiff's counsel continued to try and sort plaintiff's e-mail to screen out potentially privileged documents from those documents she intended to review. Counsel's IT representative screened out e-mail by certain names.

Subsequently, plaintiff's counsel hired a paralegal and another attorney to help review and screen for privileged documents. Ultimately, plaintiff's counsel did begin screening out potentially privileged documents, and began mapping plaintiff's case. The record does not indicate that plaintiff ever informed defendants that she was screening the documents for their privileged information, or that she offered to turn over the Expedia-issued laptop to defendants counsel. Indeed, this dispute has ultimately led to the issuance of a preliminary injunction in order for Expedia to re-obtain that computer, as well as the 90,000 plus documents retained by plaintiff.

Although the parties disagree when defendants actually learned that plaintiff's counsel possessed the laptop computer and Expedia documents, there can be no question that plaintiff's counsel knew they were in possession of privileged documents as early as June 23, 2005, when counsel received plaintiff's computers and began attempting to screen out those documents from substantive review.

2. Notification of Access to Privileged Material

As noted above, there is a disagreement between the parties about when defendants were informed that plaintiff possessed numerous privileged documents of theirs. Plaintiff asserts that

defendants should have known of the documents when she informed them that plaintiff still possessed her laptop and Expedia e-mail account back in May 2004, or at least by the time she issued her Answers to the Interrogatories in the summer of 2005. However, the record indicates that there was no explicit disclosure that plaintiff's counsel had such a large volume of defendants' potentially-privileged documents until October 2005. There is also no indication that plaintiff ever explicitly offered to return the computers or documents prior to the demand to do so in October 2005. In any event, the specific date when defendants knew that plaintiff's counsel had access and control to Expedia's property is of no import, as this Court has rejected plaintiff's constructive notice argument. As explained in *Richards*,

> simply informing Defendants that they were in possession of privileged material would not excuse or lessen the impact of the review of large numbers of privileged documents. The prejudice suffered by Defendants due to the loss of the protection of the attorney-client privilege is not assuaged by knowledge of that loss.

Richards, 168 F. Supp.2d at 1206.

3. Extent of Review of Privileged Information

From the declarations presented thus far to the Court, and through the oral arguments presented on February 9, 2006, it appears that the only review of actual privileged documents was limited to "skimming" the documents, by one paralegal and one attorney, for key words and phrases and by names of certain people. There is no indication that any of the privileged documents have been reproduced to anyone outside of counsel's office, or that they were ever printed into hard copy. The property at issue has since been turned over to a neutral forensic firm, and was recently directed to be turned back over to defendants in its entirety pursuant to the issuance of a preliminary injunction in this case. That injunction also restricts any further access to that property by plaintiff or her counsel.

Nonetheless, the Court notes that the documents identified as privileged, more than 1500 of them, were adjudged to be so by plaintiff's counsel, not defendants. The contents of some of those documents were substantively reviewed by counsel's paralegal, who ultimately discovered

that some privileged documents had not been screened out because counsel had misspelled a name. Despite that error, plaintiff's counsel continued to attempt to sort through the tens of thousands of documents provided by plaintiff, and it appears they continued to do so even after defendants demanded that plaintiff return the property to them.

Furthermore, there is no indication that the paralegal and attorney involved in substantively skimming the potentially-privileged e-mails have ceased working on the case. Thus, counsel has had the benefit of viewing that information during all of the initial preparation of plaintiff's case.

Accordingly, the Court finds that this factor weighs in favor of disqualification.

4. Significance of the Privileged Information

Plaintiff argues, and defendants do not dispute, that none of the documents reviewed by plaintiff or her counsel contained any information relevant to defendants' claims or defenses. However, plaintiff has asserted that all of the documents are relevant to her claims. During oral argument on the motion for preliminary injunction, in an attempt to persuade the Court that all of the documents would be produced in discovery anyway, plaintiff's counsel argued that all of the documents retained by plaintiff, except those protected by privilege, would be relevant to her case. Plaintiff's counsel also argues that some of the documents marked as potentially privileged may very well not be privileged and might be relevant to plaintiff's claims.

While it is not clear whether plaintiff has reviewed privileged material as relevant to her claims, the Court once again notes that it is plaintiff who has identified what she considers to be privileged. Her counsel is the one who chose the keywords and names by which to screen the documents. Defendants assert that many of the documents substantively reviewed by plaintiff's counsel are privileged, but they cannot identify those documents because plaintiff has refused to return the materials to defendants. Therefore, it is likely that plaintiff's counsel, or at the very least counsel's paralegal, has read privileged material that may adversely affect defendants' position in this litigation.

For example, while plaintiff's counsel may not have viewed any information directly pertaining to the strategies and defenses in the instant litigation, there is some indication in the record that plaintiff's counsel may have reviewed e-mails pertaining to litigation strategies in other litigations of this type. Thus, plaintiff's counsel may have an advantage in that it could possibly see a pattern of strategy developed by defendants, including settlement strategies.

Accordingly, the Court finds that this factor also weighs in favor of disqualification.

5. Fault of the Movant

Like *Richards*, this is not a case of inadvertent disclosure during the normal discovery process. Rather, plaintiff provided three computers to her counsel, in clear violation of her employee contract requiring her not to disclose defendants' documents to anyone for any reason. The Court recognizes that plaintiff's counsel was aware that plaintiff was a high level executive, and attempted to take precautions against seeing privileged material. However, the Court also recognizes that, despite those precautions, some privileged material was disclosed. The fault for that disclosure lies with plaintiff, who willingly violated her employment contract by providing the documents and computers to her counsel, and with counsel, who attempted to fashion their own system of screening for privileged information instead of simply notifying defendants' counsel that she had potentially privileged documents.

The Court also notes plaintiff's counsel's assurances that no privileged documents have been substantively reviewed or discussed. However, that assumes that plaintiff has accurately identified privileged documents and accurately screened them out. To make that assumption, the Court would be forced to condone the behavior present in this case, and open the door for future attorneys to take it upon themselves to improperly obtain an opposing party's work documents and review them for privilege, without following the normal course of discovery. The Court simply will not do that.

Accordingly, the Court finds that this factor also weighs in the favor of disqualification.

6. Prejudice to the Non-Moving Party

This action is in the earliest stages of litigation. Because of the disputes pertaining to the documents at issue in this motion, no case schedule has issued, no discovery period has started, and no trial date has been set. In addition, there is nothing to suggest that plaintiff cannot find other counsel. Indeed, she apparently has no lack of money to hire new counsel, having made more than $2 million in 2004.

While plaintiff argues that she will be deprived of the counsel of her choice, the *Richards* Court squarely rejected that argument. Just as in *Richards*, where the Court explained that plaintiffs and their counsel were directly responsible for their position, so to are plaintiff and her counsel in the instance case. Plaintiff's counsel deliberately chose not to return Expedia's laptop, along with all of the documents, when she became aware that they contained potentially privileged materials. Instead, she took it upon herself to screen out what she deemed to be privileged materials, and substantively reviewed the remaining documents. Moreover, the Court notes that plaintiff's co-counsel, Ms. Thomas, is not subject to this motion, and will remain plaintiff's counsel at this point in time. Therefore, plaintiff retains the numerous work hours put into her case thus far.

Accordingly, the Court finds that the deprivation of counsel of choice does not weigh heavily against disqualification.

C. Remedy

Based on the record before this Court, it is clear that plaintiff's counsel were aware that they were receiving from plaintiff an Expedia-issued computer containing numerous privileged documents, but failed to offer to return that computer immediately to defendants. Instead, plaintiff's counsel decided to review the documents themselves, while attempting to screen out anything they deemed privileged. That information was supplied to plaintiff's counsel in direct violation of plaintiff's employment agreement, and there is nothing in the record indicating that plaintiff's counsel inquired about the agreement not to disclose, or whether the employment

agreement was considered at all before requesting the computers from plaintiff. Finally, plaintiff would not be prejudiced by the loss of her counsel of choice.

In considering the disqualification of counsel involving the loss of protection of privilege, "the Court should resolve any doubts in favor of disqualification." *Oxford Systems Inc., supra,* at 1066 (citations omitted). In the instant case, although plaintiff's counsel has gone to great lengths to persuade this Court that no privileged information was substantially reviewed or discussed, the Court finds that the damage has been done, and "the undisputed facts of the case create a substantial taint on any future proceedings." *Richards*, 168 F. Supp.2d at 1209. Simply because the Court has since imposed a preliminary injunction requiring the return of Expedia's property, that taint has not been removed. Therefore, the Court finds that the only remedy to mitigate the effects of Schwerin Campbell Barnard's possession and review of tens of thousands of defendants' documents is disqualification.

CONCLUSION

The Court, having considered defendants' Motion for Disqualification (Dkt. #13), plaintiffs' Opposition (Dkt. #43), defendants' Reply (Dkt. #60), plaintiff's Errata (Dkt. #63), the declarations in support and opposition thereto, the oral arguments presented by the parties on defendants' Motion for Preliminary Injunction on February 9, 2006, and the remainder of the record, hereby finds and ORDERS:

(1) Defendants' Motion for Disqualification (Dkt. #13) is GRANTED. The law firm of Schwerin Campbell Barnard, its attorneys, paralegals and any other of its employees, including associated attorney, Curt Chapman, are hereby disqualified from this case.

(2) At this time, Suzanne Thomas remains plaintiff's counsel, and this case shall proceed.

(3) Nothing in this Order prevents any party from moving for any relief from deadlines should that become necessary due to her counsel's disqualification.

(4) The Clerk shall send a copy of this Order to all counsel of record.

DATED this 17th day of February, 2006.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE